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No. 1071

IN THE

Supreme Court of the United States

October Term, 1963

SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,
Petitioners,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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June 4, 1964

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, American Society of Composers, Authors and Publishers ("ASCAP" or the "Society"), submits this brief in opposition to the petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Question Presented

The narrow question presented by the petition is whether the Amended Final Judgment* entered in 1950 on the consent of the parties in the Government's antitrust action against respondent (*United States* v. *American Society of Composers, Authors and Publishers*, S.D.N.Y. Civ. No. 13-95) requires respondent to grant licenses that would

* Printed as Appendix D to the petition, pp. D1-D18.

exclude from their television coverage all program material pre-recorded by others than petitioners, such as motion pictures, television films and pre-taped shows, whether or not that material contained copyrighted music in the ASCAP repertory.

This artificially exclusory form of license was collectively sought in 1961 by a group representing two-thirds of the nation's television stations (petitioners) for the first time since those stations began taking commercial performing right licenses from ASCAP in 1949. This exclusory form of license would, perforce, shift petitioners' obligation to pay for their own broadcast performances of ASCAP copyrighted music to independent producers, who are not required under the Copyright Act, 17 U.S.C. §1 et seq., to purchase performing rights since they, unlike petitioners, do not perform music in public for profit.

Statement

Before the organization of ASCAP, there was no effective method by which individual writers and publishers of music could secure payment for the use of their copyrighted musical works in public performances for profit.

The users of music were so numerous and widespread, and each instance of use so fleeting, that no individual writer or publisher could take the measures necessary to negotiate licenses with them or to detect and prove unauthorized uses and secure legal redress. Conversely, music users who wished to perform thousands of works each year without risk of copyright infringement had no practical

means of obtaining licenses from the individual owners of all those works.

As a means of solving the problems of both the copyright owners and the users of music, ASCAP was organized in 1914 as an unincorporated membership association representing both writers and publishers.

Today ASCAP has over 7,000 writer members and 2,000 publisher members, who grant to ASCAP non-exclusive rights to license the public performance of the copyrighted works that they have composed or published. Through the Society the works of its members are made readily available to over 35,000 enterprises located throughout the United States without the burden and necessity of clearing each work separately.

The Society's licensees include all the television and radio networks and over 500 commercial television stations and 4,000 radio stations.

The television networks and almost all the television stations have elected to secure blanket licenses from the Society, entitling them to use all or any portion of the works in the Society's repertory on any program they present without separately accounting for each use. These licenses obviate, for both the user and the copyright owner, the countless complex and expensive individual negotiations that would otherwise be required, and greatly facilitate the free flow of high quality music to the public.

The present type of blanket license held by appellants was painstakingly negotiated between the Society and the television industry in 1949 for the period 1949 through 1953 (R.-Vol. II, A12-13). That type of license was later renewed for the period 1954-1957; and again for the period

1958-1961 (R. Vol. II, A13-14). Thus appellants have never before sought the arbitrarily circumscribed and artificially exclusory type of license they now demand.

Both Chief Judge Ryan, who has had eight years of experience in administering the Amended Final Judgment, and a unanimous Court of Appeals for the Second Circuit, found that the Judgment did not require ASCAP to grant this "radically different" license (Pet., p. C1). The demanded form of exclusory license would inevitably force the many independent producers to bargain in the dark with thousands of copyright owners or with ASCAP for television performing rights without knowing whether, or the extent to which, their productions would be performed on television. The damage to individual rights would be disastrous.

Argument

The decision below is clearly correct. Moreover, it neither involved nor turned on any question of general importance beyond the confines of the carefully drawn, very specialized, and carefully administered consent decree here involved.

The right of the Government to seek modification of the consent decree as a party thereto, as well as the right of petitioners to bring an independent private antitrust suit, are in no way affected by the decision below. That decision held only "that the District Court did not err in holding that the Judgment as it now stands does not require ASCAP to issue licenses of the sort appellants requested." (Pet., p. B16).

Accordingly, there is no reason for further review of the holdings of the two courts below, which were based on the same, narrowly delineated ground.

I.

The Decision Below Is Clearly Correct

1. Petitioners contend that the Amended Final Judgment compels ASCAP to grant them licenses that would exclude from their coverage all program material pre-recorded by others than petitioners, including material clearly containing copyrighted ASCAP music.

Petitioners seek to base their contention not upon the specific language of any provision of the decree requiring ASCAP to grant the license demanded, but rather upon the general language of Sections VI and IX(A), which provide, respectively, (i) that ASCAP must license all its musical works to any license applicant and (ii) that "ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested."

As the Court of Appeals pointed out, the above quoted language of Section IX(A) relates to "requests for licenses which some other portion of the Judgment required ASCAP to grant." It is therefore necessary to consider the other provisions of the Judgment, particularly "the specific and detailed provisions relating to television stations, networks and producers" (Pet., p. B15).

One of those provisions, Section VII, sets forth the special duties owed by ASCAP to broadcaster licensees. Its language makes clear that the only license that ASCAP "is ordered and directed" to issue to them upon request is a "per program" license—*i.e.*, a license the fees for which are based on "*each* program in which compositions in the

SCAP repertory shall be performed", whether or not ose programs are pre-recorded.*

* Section VII of the Amended Final Judgment provides:

"Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:

(A) Enjoined and restrained from issuing any license, the fee for which

(1) in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory, or

(2) in the case of sustaining programs, does not vary in proportion either (a) to the performance of compositions in the ASCAP repertory during the term of the license, or (b) to the number of programs on which such compositions or any of them are performed,

unless the radio broadcaster or telecaster to whom such license shall be issued shall desire a license on either or both of such bases;

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license." (Pet., pp. D9-D10)

For greater convenience to the broadcaster in selecting music and reporting its use, ASCAP is also permitted, but not ordered, under Section VII(A) to issue a "blanket" license—if requested by a broadcaster—the fee for which is based on all the broadcaster's programs, whether or not they contain ASCAP music.

ASCAP is not required by Section VII, or by any other provision of the decree, to grant to a broadcaster a license excluding programs containing ASCAP music because such programs have been pre-recorded by others than the broadcaster. (See the opinion of the Court of Appeals, Pet., pp. B11-B12.)

The other provision, Section V(B) of the Amended Final Judgment, orders ASCAP to issue—to any producer who so requests—a license covering compositions "recorded for performance on specified commercially sponsored radio programs or television programs" presented by stations enumerated by the producer.

Section V(B) orders ASCAP to *permit* independent producers to obtain television performing rights if they wish to do so as a means of facilitating the marketing of their products. As the Court of Appeals noted, Section V(B) was thus designed for the benefit of independent producers to give them the *option* of clearing their program materials through ASCAP. However, the form of license now demanded by petitioners, by exempting pre-recorded programs from the stations' licenses, would inevitably *require* independent producers to obtain television performing rights from ASCAP as a pre-requisite to the successful marketing of their products. (Pet., p. B14)

The independent producer would have to bargain with many individual copyright owners or with ASCAP for

performing rights licenses before he even knew whether, or to what extent, his productions would be presented on television. Only the television stations—of which petitioners constitute at least two-thirds—have the power to determine what pre-recorded material they will present.

The Court of Appeals therefore properly rejected petitioners' argument, concluding: (a) that the general language of Sections VI and IX, "applying to all kinds of users, cannot fairly be read as overriding the specific and detailed provisions [of Sections V and VII] relating to television stations, networks and producers", and (b) that petitioners' reading of that general language "ignores both context and good sense." (Pet., pp. B9-B10, B15).*

* Taken literally, petitioners' reading would compel ASCAP to grant licenses differing in their terms in as many myriad ways as the individual preferences of thousands of music licensees might devise. In an effort to avoid such an impermissible result, petitioners necessarily conceded below "that ASCAP was not bound to grant every kind of license which the ingenuity or whim of hundreds of television station owners could devise" (Pet., p. B10), and were reduced to arguing there, as they do here, that ASCAP is only required to grant licenses "reasonably" requested. But this argument does not help petitioners either. What may seem reasonable for an applicant to request may be equally reasonable for ASCAP to refuse. Indeed, this is why contract terms are negotiated by businessmen instead of being written for them by courts.

It is indisputable that the existing licenses held by petitioners are reasonable since they conform to the provisions of Section VII and have been issued to television stations since 1949 at their own request. Were the District Court to begin writing "reasonable" contract terms to fit the individual needs of the thousands of commercial music users who might be unwilling to work out their differences with ASCAP, little other judicial business could be done in the Southern District of New York.

Moreover, petitioners' argument would require ASCAP to grant many different types of licenses to licensees of the same class of music user. Such a requirement would obstruct compliance with Section IV(C) of the Judgment, which enjoins ASCAP from discriminating "in license fees or other terms and conditions between licensees similarly situated" (Pet., p. D4).

2. Nor is there any basis for petitioners' charge that the Court of Appeals ignored the background of the Amended Final Judgment. Rather, that court began its discussion by noting that the Judgment was designed in part to remedy limitations in the earlier, 1941 decree—*i.e.*, the lack of (i) provisions specifically addressed to the licensing of *television* performances and (ii) provisions for the judicial determination of reasonable license fees.

In seeking to rely on the general language of Sections VI and IX, petitioners claim that the conclusions reached in *Alden-Rochelle, Inc.* v. *American Society of Composers, Authors and Publishers*, 80 F. Supp. 888, *modified*, 80 F. Supp. 900 (S.D.N.Y. 1948), and *M. Witmark* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), which were before the District Court when it entered the Amended Final Judgment in 1950, are equally applicable to the licensing of pre-recorded material for broadcast by television stations.

Petitioners thus argue that the solution adopted by the judgment—on consent of the parties—for the licensing of motion picture performance rights for exhibition in theatres should now be applied to the telecasting of pre-recorded material—over the opposition of ASCAP and contrary to the plain meaning of the Amended Final Judgment.

The judgment entered in the *Alden-Rochelle* action was vacated on March 14, 1950 at the time of the entry of the Amended Final Judgment, which completely superseded the *Alden-Rochelle* judgment. Specific language was set forth in the Amended Final Judgment to take account of the practices at issue in *Alden-Rochelle*.

Thus, for example, under Section V(C) ASCAP is required to issue, upon request, "to any person engaged in

producing motion pictures . . . a single license of motion picture performance rights covering the United States, its territories and possessions, without requiring further licenses" (Pet., p. D7).

Section IV(E) of the Judgment prohibits ASCAP from granting licenses for motion picture performance rights to "any motion picture theatre exhibitor" (Pet., p. D4). Significantly, this section makes no mention of any prohibition against licensing television stations to exhibit films or other pre-recorded material over television.

It is clear from the *Alden-Rochelle* opinion, underlying this language of the Amended Final Judgment, that the motion picture performance right referred to in the Judgment consisted of the right to perform musical works in motion picture theatres, and did not relate to the different medium of public communication and entertainment represented by the telecasting of pre-recorded program material.

There is a sound reason for that differentiation. The economic disadvantage faced by the individual theatre owner in dealing with ASCAP is entirely different from the enormous bargaining power wielded by the wealthy, powerful and highly organized broadcasting industry.

The broadcasters combine together for their negotiations with ASCAP. They also collectively own a captive music publishing and performing rights organization, Broadcast Music, Inc., through which they jointly control a large and increasing supply of subsidized music.

Although television was well established in 1950, and although the Amended Final Judgment expressly took account of this medium (see, *e.g.*, Sections VII and V(B)), nothing in the Judgment prevents ASCAP from licensing

to television stations the performing rights for the works in the ASCAP repertory that are pre-recorded in motion pictures, television films, or other program material.

Appellants concurred in this construction of the Judgment for a dozen years by demanding, receiving, and paying ASCAP for the right to telecast the music contained in such pre-recorded material.*

II.

No Important Federal Question Is Presented

1. The petition does not bring to this Court any important federal question. All that is involved here is an interpretation of a carefully worked out decree as it relates to a particular class of music users, the television broadcasters.

The unique complexities of the music industry and its relationships with independent producers, networks, and individual stations have little bearing on other areas of the national economy. As stated *supra*, pp. 2-3, the creation and use of music is characterized by the imperative need of the thousands of individual copyright owners to cooperate in licensing authorized users and in policing infringements, and the equally imperative need of commercial music users to have an efficient and speedy means of advance clearance for any compositions they desire to perform.

The decisions below rested on no principles of general application, other than the sound and salutary recognition by both the District Court and the Court of Appeals

* The Court of Appeals noted that "we cannot regard the decade of acquiescence in the existing types of licenses as wholly irrelevant to the construction of the Judgment" (Pet., p. B14).

that ASCAP, as a party to a consent decree entered without any findings or adjudication of illegality, was entitled to rely on its unambiguous terms. See *Hughes* v. *United States*, 342 U.S. 353, 357 (1952); *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 23 (1959).

2. Petitioners' claim that anticompetitive effects will flow from the interpretation placed on the decree by the courts below is completely unsupported by evidence and is not worthy of review. That claim, even if it were true (which it is not), would be irrelevant in this proceeding.

As the Court of Appeals found, ASCAP has a right to rely on the terms of the decree as it now stands. If the abuses petitioners professedly fear were to arise, or if there should be deficiencies in the consent decree, adequate remedies are available for dealing with them. If the Government believed that petitioners' contention had merit, it could apply to the District Court for modification of the decree, or the petitioners could institute an independent private suit to remedy their alleged injury.

It is also significant that the Government has not sought review of the District Court's dismissal of this proceeding and has not supported petitioners in their efforts on appeal.

Accordingly, there is no justification for twisting the language of the Judgment so as to amend it at the instance of petitioners who are not parties to the Judgment and without following the clear and carefully prescribed procedures for its amendment. (Pet., pp. B16, C5-C6).

In addition to the lack of substance in petitioners' contention, the relief requested by petitioners would itself

produce serious anticompetitive injury. As the Court of Appeals stated in rejecting this contention of petitioners, "we are faced with ASCAP's answer that the relief sought by appellants would be seriously detrimental to independent music writers and would itself adversely affect competition by facilitating the activities of Broadcast Music, Inc., a music licensing and publishing organization controlled by the combined television and radio broadcasting industry" (Pet., p. B16).

For example, as detailed in the ASCAP Answer (R. Vol. I, pp. 68a-71a), in anticipation of this proceeding Broadcast Music, Inc. ("BMI") has operated what amounts to a slush fund for predatory and destructive bargaining.* A large portion of BMI's licensing revenues, instead of being distributed to the writers and publishers who license their works through BMI, has been accumulated and used for entering into contractual arrangements with strategically selected music writers and publishers and for subsidizing producers of television program materials.

Under those arrangements certain writers and publishers receive, on a discriminatory basis, substantial subsidies and guarantees (which ASCAP is forbidden by the Judgment to grant), not measured by performing uses of their works, but in return for licensing their works through BMI and not through ASCAP or any other licensing organization.

The producers, instead of paying for the use of works, *are paid* for agreeing to insert specified amounts of BMI-licensed music in their program materials. Thus today many producers of television program materials fill certain

* Petitioners own almost 60% of the stock of BMI.

of their music needs out of the BMI repertory at either no cost whatsoever or at cut rate prices offered solely as part of a program to destroy the bargaining power of independent music writers and publishers who are not affiliated with or subject to the control of the broadcasting industry.

It takes little imagination to perceive how the unique and special kind of license petitioners (constituting two-thirds of the nation's television stations) now would like to have from ASCAP, would slide into an agreed slot in the broadcaster-BMI scheme to dominate copyrighted music, to destroy ASCAP, to deny independent music writers and publishers their bargaining rights, and to deprive the public of the free flow of the music it enjoys.

The provisions of Section IX of the Judgment for the fixing of reasonable fees for licenses were never intended as a vehicle for the trial of complex and time-consuming antitrust charges and countercharges of the sort that petitioners and ASCAP have alleged against each other.

CONCLUSION

This case presents a very narrow and particularized issue that is not one of general public importance warranting the consideration of this Court. The decision below was correct, and the petition for certiorari should be denied.

Respectfully submitted,

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